

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

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AMERICAN OVERSIGHT,  
1030 15th Street NW, B255  
Washington, DC 20005

*Plaintiff,*

v.

U.S. DEPARTMENT OF DEFENSE,  
1600 Pentagon 3E788  
Washington, DC 20301-1600

*Defendant.*

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Case No. 19-cv-

**COMPLAINT**

1. Plaintiff American Oversight brings this action against the U.S. Department of Defense under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking declaratory and injunctive relief to compel compliance with the requirements of FOIA.

**JURISDICTION AND VENUE**

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. §§ 1331, 2201, and 2202.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

4. Because Defendant the U.S. Department of Defense has failed to comply with the applicable time-limit provisions of FOIA, American Oversight is deemed to have constructively exhausted its administrative remedies pursuant to 5 U.S.C. § 552(a)(6)(C)(i) and is now entitled

to judicial action enjoining the agency from continuing to withhold agency records and ordering the production of agency records improperly withheld.

### **PARTIES**

5. Plaintiff American Oversight is a nonpartisan, non-profit section 501(c)(3) organization primarily engaged in disseminating information to the public. American Oversight is committed to promoting transparency in government, educating the public about government activities, and ensuring the accountability of government officials. Through research and FOIA requests, American Oversight uses the information it gathers, and its analysis of it, to educate the public about the activities and operations of the federal government through reports, published analyses, press releases, and other media. The organization is incorporated under the laws of the District of Columbia.

6. Defendant the U.S. Department of Defense (DOD) is a department of the executive branch of the U.S. government headquartered in Washington, DC, and an agency of the federal government within the meaning of 5 U.S.C. § 552(f)(1). DOD has possession, custody, and control of the records that American Oversight seeks.

### **STATEMENT OF FACTS**

7. American Oversight submitted four FOIA requests to DOD on November 20, 2018, seeking, broadly speaking, records related to then-Deputy Secretary Patrick Shanahan's compliance with ethics requirements, his communications with his former employer, Boeing, and his calendar entries. On January 1, 2019, Deputy Secretary Shanahan assumed the role of Acting Secretary of Defense.

8. On February 28, 2019, CNN reported that the president is likely to nominate Acting Secretary Shanahan to serve as the permanent Secretary of Defense. Barabara Starr &

Jeremy Diamond, *Trump Leaning Towards 'Keeping' Shanahan at Pentagon to Replace Mattis Permanently*, CNN (Feb. 28, 2019, 3:56 PM),

<https://www.cnn.com/2019/02/28/politics/shanahan-trump-pentagon/index.html>.

*Boeing Communications Request*

9. On November 20, 2018, American Oversight submitted a FOIA request to DOD seeking email communications between political appointees in the Office of the Deputy Secretary of Defense and Boeing. American Oversight's FOIA request to DOD specifically sought:

All email communications (including email messages, attachments, and calendar entries or invitations) between political appointees\* in the Office of the Deputy Secretary of Defense (DSD) and any individual at Boeing, including CEO Dennis Muilenberg, and any email addresses ending in boeing.com.

For this portion of the request, American Oversight requests OSD search, at a minimum, the records of the following individuals:

- Deputy Secretary of Defense Patrick Shanahan
- Confidential Assistant Jillian Berrios
- Special Assistant Justin Johnson

This request includes all messages on which DSD officials appear (whether in the to, from, cc, or bcc field), as well as all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

\*"Political appointee" should be understood as any person who is a Presidential Appointee with Senate Confirmation (PAS), a Presidential Appointee (PA), a Non-career SES, any Schedule C employees, or any persons hired under Temporary Non-career SES Appointments, Limited Term SES Appointments, or Temporary Transitional Schedule C Appointments.

Please provide all responsive records from July 19, 2017, through the date of search.

10. On November 21, 2018, DOD acknowledged receiving the Boeing Communications Request and assigned the request tracking number 19-F-0306.

11. On March 2, 2019, American Oversight sought expedited processing of this request in light of reports that Acting Secretary Shanahan would likely be nominated to serve as the Secretary of Defense in a permanent capacity. Expedited processing is warranted because Mr. Shanahan's impending nomination has created an urgent public need for records with the potential to shed light on Mr. Shanahan's compliance with ethics requirements and actions during his service at DOD before the U.S. Senate votes to confirm him to serve as Secretary of Defense in a permanent capacity.

12. American Oversight has not received any further communication from DOD regarding this FOIA request.

*Ethics Communications Request*

13. On November 20, 2018, American Oversight submitted a FOIA request to DOD seeking email communications between Patrick Shanahan, Jillian Berrios, or any assistants communicating on their behalves and DOD ethics officials. American Oversight's FOIA request to DOD specifically sought:

All email communications (including email messages, attachments, and calendar entries or invitations) between 1) Deputy Secretary of Defense Patrick Shanahan, Confidential Assistant Jillian Berrios, or any assistants communicating on their behalves, and 2) any Department of Defense ethics officials, including officers in the Standards of Conduct Office, regarding ethics considerations related to either official's past employment with Boeing.

This request includes all messages on which DSD officials appear (whether in the to, from, cc, or bcc field), as well as all prior messages (whether incoming or outgoing) reflected in the responsive correspondence and any attachments thereto.

14. On November 21, 2018, DOD acknowledged receiving the Ethics Communications Request and assigned the request tracking number 19-F-0311. In that acknowledgement, DOD requested clarification regarding the date range for the search for responsive records. American Oversight responded that same day that the request sought all records from April 1, 2017, through the date of the search.

15. On March 2, 2019, American Oversight sought expedited processing of this request in light of reports that Acting Secretary Shanahan would likely be nominated to serve as the Secretary of Defense in a permanent capacity. Expedited processing is warranted because Mr. Shanahan's impending nomination has created an urgent public need for records with the potential to shed light on Mr. Shanahan's compliance with ethics requirements and actions during his service at DOD before the U.S. Senate votes to confirm him to serve as Secretary of Defense in a permanent capacity.

16. American Oversight has not received any further communication from DOD regarding this FOIA request.

#### *Ethics Records Request*

17. On November 20, 2018, American Oversight submitted a FOIA request to DOD seeking records related to Patrick Shanahan's ethics recusals, determinations, authorizations, or waivers, as well as records related to Mr. Shanahan's divestiture from Boeing investments and policies for screening Mr. Shanahan from participating in matters related to Boeing. American Oversight's FOIA request to DOD specifically sought:

1. Any ethics recusals, determinations, authorizations, or waivers for Deputy Secretary Shanahan regarding his participation in matters related to Boeing.
2. Any records or memoranda reflecting Mr. Shanahan's divestiture of investments in Boeing or its subsidiaries or corporate affiliates.

Please provide all responsive records from July 19, 2017, through the date of search.

3. Records sufficient to identify all procedures and/or policies put in place by the Office of the Deputy Secretary of Defense so that Deputy Secretary Shanahan's potential meetings and calendar entries are screened for Boeing involvement to ensure he is not engaged in matters related to Boeing.

Please provide all responsive records from March 16, 2017, through the date of search.

18. On November 21, 2018, DOD acknowledged receiving the Ethics Records Request and assigned the request tracking number 19-F-0310.

19. On March 2, 2019, American Oversight sought expedited processing of this request in light of reports that Acting Secretary Shanahan would likely be nominated to serve as the Secretary of Defense in a permanent capacity. Expedited processing is warranted because Mr. Shanahan's impending nomination has created an urgent public need for records with the potential to shed light on Mr. Shanahan's compliance with ethics requirements and actions during his service at DOD before the U.S. Senate votes to confirm him to serve as Secretary of Defense in a permanent capacity.

20. American Oversight has not received any further communication from DOD regarding this FOIA request.

#### *Calendar Entries Request*

21. On November 20, 2018, American Oversight submitted a FOIA request to DOD seeking all calendars and calendar entries of Patrick Shanahan and his assistant Jillian Berrios. American Oversight's FOIA request to DOD specifically sought the following records:

All calendars or calendar entries for the following individuals, including any calendars maintained on behalf of these individuals (e.g., by an administrative assistant):

- a. Deputy Secretary of Defense Patrick Shanahan

b. Confidential Assistant Jillian Berrios

American Oversight requests that the calendars be produced in a format that includes all invitees, any notes, and all attachments.

Please provide all responsive records from the officials' start dates through the date of search.

Please do not limit your search to Outlook calendars. We request the production of any document—paper or electronic, whether on government-issued or personal devices—used to track or coordinate how these individuals allocate their time on agency business.

22. On November 26, 2018, DOD acknowledged receiving the Calendar Entries Request and assigned the request tracking number 19-F-0314.

23. On February 25, 2019, DOD made a purportedly final production of responsive calendar records to American Oversight. The calendar records were produced in a monthly format and did not display all applicable calendar entries or the requested information within those entries.

24. On February 28, 2019, DOD represented by phone and email that it had rescinded its purportedly final response and indicated that the agency would continue its search for responsive records before submitting a final response.

25. On March 2, 2019, American Oversight sought expedited processing of this request in light of reports that Acting Secretary Shanahan would likely be nominated to serve as the Secretary of Defense in a permanent capacity. Expedited processing is warranted because Mr. Shanahan's impending nomination has created an urgent public need for records with the potential to shed light on Mr. Shanahan's compliance with ethics requirements and actions during his service at DOD before the U.S. Senate votes to confirm him to serve as Secretary of Defense in a permanent capacity.

26. American Oversight has not received any further communication from DOD regarding this FOIA request.

*Exhaustion of Administrative Remedies*

27. As of the date of this Complaint, Defendant has failed to (a) notify American Oversight of a final determination regarding American Oversight's FOIA requests, including the scope of responsive records Defendant intends to produce or withhold and the reasons for any withholdings; or (b) produce the requested records or demonstrate that the requested records are lawfully exempt from production.

28. Through Defendant's failure to respond to American Oversight's FOIA requests within the time period required by law, American Oversight has constructively exhausted its administrative remedies and seeks immediate judicial review.

**COUNT I**

**Violation of FOIA, 5 U.S.C. § 552**

**Failure to Conduct Adequate Searches for Responsive Records**

29. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

30. American Oversight properly requested records within the possession, custody, and control of Defendant.

31. Defendant is an agency subject to FOIA and must therefore make reasonable efforts to search for requested records.

32. Defendant has failed to promptly review agency records for the purpose of locating those records that are responsive to American Oversight's FOIA requests.

33. Defendant's failure to conduct adequate searches for responsive records violates FOIA.



34. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly make reasonable efforts to search for records responsive to American Oversight's FOIA requests.

**COUNT II**  
**Violation of FOIA, 5 U.S.C. § 552**  
**Wrongful Withholding of Non-Exempt Records**

35. American Oversight repeats the allegations in the foregoing paragraphs and incorporates them as though fully set forth herein.

36. American Oversight properly requested records within the possession, custody, and control of Defendant.

37. Defendant is an agency subject to FOIA and must therefore release in response to a FOIA request any non-exempt records and provide a lawful reason for withholding any materials.

38. Defendant is wrongfully withholding non-exempt agency records requested by American Oversight by failing to produce records responsive to its FOIA requests.

39. Defendant is wrongfully withholding non-exempt agency records requested by American Oversight by failing to segregate exempt information in otherwise non-exempt records responsive to American Oversight's FOIA requests.

40. Defendant's failure to provide all non-exempt responsive records violates FOIA.

41. Plaintiff American Oversight is therefore entitled to declaratory and injunctive relief requiring Defendant to promptly produce all non-exempt records responsive to its FOIA requests and provide an index justifying the withholding of any responsive records withheld under claim of exemption.

**REQUESTED RELIEF**

WHEREFORE, American Oversight respectfully requests the Court to:

- (1) Order Defendant to conduct a search or searches reasonably calculated to uncover all records responsive to American Oversight's FOIA requests;
- (2) Order Defendant to produce, by such date as the Court deems appropriate, any and all non-exempt records responsive to American Oversight's FOIA requests and an index justifying the withholding of any responsive records withheld under claim of exemption;
- (3) Enjoin Defendant from continuing to withhold any and all non-exempt records responsive to American Oversight's FOIA requests;
- (4) Award American Oversight attorneys' fees and other litigation costs reasonably incurred in this action, pursuant to 5 U.S.C. § 552(a)(4)(E); and
- (5) Grant American Oversight such other relief as the Court deems just and proper.

Dated: March 5, 2019

Respectfully submitted,

/s/ Daniel A. McGrath

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